85-2117

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOE L. ROBINSON,
PETITIONER

versus

ROBERT C. DAUGHERTY, ET AL,
RESPONDENT

ON PETITION FOR APPEAL TO THE
UNITED STATES SIXTH CIRCUIT

PETITION FOR CERTIORARI

JOE L. ROBINSON
5208 WHALEY DRIVE
DAYTON, OHIO 45427

45pp

QUESTION PRESENTED

When a Common Pleas Court Judge orders plaintiff to obtain the service of an attorney to commence a settlement and the attorney fails to prosecute the case; should plaintiff be held responsible for his attorney's action, does this violates plaintiff Constitutional Rights. Other judgments were affected by the common pleas court judgment.

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OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is reported at Robinson v. Daugherty, et al., case no. 85-3569 (Ohio 1986). The opinion of the United States District Court for the Southern District of Ohio, Western Division is reported at Robinson v. Daugherty, et al.,case no. C-3-84-559 (Ohio 1985). Other relevant state and appellate court opinions involving the same respondent can be found at Robinson v. Daugherty,et al., case no. 8516 (Ohio 1985), Robinson v. Daugherty, et al., case no. 8387 (Ohio 1983), Robinson v. Daugherty, et al,. case no. 77-2348 (Ohio 1977).

JURISDICTION

The opinion of the United States Sixth Circuit Court of Appeals was rendered on January 21, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL
PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent:

> Congress shall make no law abridging the freedom of speech or the right of the people to petition the Government for a redress of grievances.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved and no fact

tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

The Fourteeneth Amendment of the United States Constitution provides in pertinent part: SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 12, 1974, plaintiff, Joe L. Robinson was injured while working at Delco Moraine, G.M.C., Dayton, Ohio. His attorney, E. S. Galion, filed a claim for worker's compensation which was denied. He appeal his case to the Montgomery County Common Pleas Court of Ohio, which was dismissed. After plaintiff appeal to the Court of Appeals of Montgomery County was afirmed, he filed a complaint to the United States District

Court for the Southern District of Ohio Western Division which was dismissed. He appeal his case to the United States Sixth Circuit Court of Appeals who affirmed the District Court dismissal.

STATEMENTS OF THE FACTS

On October 14, 1977, petitioner filed a notice of appeal to the Montgomery County Common Pleas Court of Ohio from the denied decision of the Dayton Regional Board of Review, Robinson v. Daugherty,et al,. case no. 77-2348. On September 20, 1978, a pre-trial conference was held, the respondent agreeded to pay petitioner worker's compensation. Petitioner was ordered by the judge, John Maegher to obtain the service of an attorney to commenced a settlement. The judge stated he would not settle the

case unless petitioner obtain the service of an attorney. Petitioner obtained several attorneys; one attorney was Michael J. Lone, who was also representing him in a divorce proceeding, a disagreement came up between him and his attorney over a divorce matter and attorney Long resigned from both cases without prosecuting the civil case, another attorney, Robert Nolan, let the civil case lie around in court pending the outcome of the divorce and did not prosecute the case, a third attorney, Bruce I. Beemer was hired to handle only his civil case, but he refused to prosecute the case and it was dismissed by Judge John Maegher for failure to prosecute.

Petitioner case was kept under wrap, he did not have access to his file and the attorneys refused to provide him

copies. In 1980, petitioner hired two other attorneys, Bruce I. Nickelson and Richard Austin to locate the case but they stated they could not find it. Finally, he hired attorney Dukes, who located the case and stated he could get him two thousand dollars for a complete settlement without any benefits, petitioner refused the offer and Mr. Dukes refused to tell petitioner where his record could be located.

In 1983, petitioner had two operations resulting from his 1974 injuries. He filed a notice of appeal to the Court of Appeals of Montgomery County, Ohio Robinson v. Daugherty, et al,. case no. CA-8387, and demanded to see his records. In the Court of Appeals of Montgomery County, Ohio decision and entry of August 9, 1983, stated "we are unable to find in the records of the common pleas

court any such order. The order or judgment is not showing on the docket of the common pleas court. The appeal, however, is dismissed for the lack of a final appealable order". On September 6, 1983, Judge John Maegher entered an order of dismissal num pro tunc, relative to March 21, 1978 and pursuant to Civ. R. 41 (B) (1), following this dismissal, petitioner appeal his case to the court of appeals of Montgomery County, Ohio, Robinson v. Daugherty, et al case no. 8516 stating that the trial court erred in dismissing his case stating he did not prosecute; however, it was not petitioner who did not prosecute but his attorney who failed to prosecute, which he was ordered to obtain by the judge in order to commence settlement. The court of appeals affirmed the trial court dismissal. In their dismissal

they failed to state that on September 20, 1978, petitioner had a pre-trial conference on a default charge which was granted to him, they failed to state that the respondent's attorney did not appear at the oral-argument held before the appeal court. They stated that petitioner failed to prosecute his case; but it was the attorney who failed to prosecute, they did not mention the attorney. They gave different trial court dismissal dates of the case; March 21, 1978, February 14, 1979, and September 6, 1983. They stated on March 14, 1978, appellant filed his complaint; however, on that date appellant filed his default charges.

The appellees, Delco Moraine, G.M.C. and Bureau of Worker's Compensation answers were back-dated to April 3, 1978 and August 4, 1978, the same as Judge John Maegher 1983 dismissal was back-dated

to 1978.

Petitioner filed a complaint of discrimination in the United States District Court for the Southern District of Ohio Western Division, Robinson v. Daugherty, et al,. case no. C-3-84-559, and stated his rights had been violated in state courts, 42 U.S.C. 1983, also a claim for relief O. C. Rule 8 (A). He was accused of not prosecuting his complaint, however, the respondent failed to answer petitioner complaint in state court timelywise, and refused to appear in court on different schedule dates. The district court dismissed the complaint from a motion filed by the defendant "seeking an order of the court dismissing the amended complaint of the plaintiff for the reason that same fails to state a claim upon which relief can be granted is deemed by this court to be well

taken and same is therefore sustained in its entiety". Petitioner appeal his case to the U.S. Sixth Circuit and cited in federal questions the civil rights acts of 1964, 28 U.S.C. 1443 (1) (1964 ed), Georgia v. Rachel, U. S. 365, 42 U.S.C. 1981 and 1983 and the Seventh and Fourteenth Amendments. The Court of Appeals of the Sixth Circuit affirmed the District Court's dismissal "dismissed plaintiff's action for lack of subject matter jurisdiction", however, the District Court stated in their order they dismissed plaintiff complaint "failure to state a claim upon which relief can be granted".

REASONS WHY THE WRIT SHOULD BE GRANTED

CERTIORARI SHOULD BE GRANTED BECAUSE A CLIENT

SHOULD NOT BE HELD RES-
PONSIBLE FOR HIS ATTORNEY
ACTION, LINK v.WABASH
RAILROAD, 82 SCT. 1386,
370 U.S. 626,IN A MANNER
WHICH HAVE BEEN DECIDED
BY THE U. S. SUPREME
COURT.

This case concerns an injured employee who was denied worker's compensation by the bureau and filed his complaint in the Montgomery County Common Pleas Court of Ohio to participate into the funds. This case was commenced for a settlement at which time the judge order the petitioner to obtain the service of an attorney for settlement purposes. Petitioner obtain several attorneys who failed to prosecute his case and it was dismissed . Petitioner filed a notice of appeal stating he should not be held

responsible for his attorney action as Link v. Wabash Railroad 1962, 82 SCT 1386, 370 U.S. 626, 8 L.e.d. 2d 734, where the plaintiff attorney failed to prosecute his case and the judge dismissed the case which had been pending for six years, for want of prosecution. This case came before the Supreme Court Chief Justice Warren argued that there had been no failure of prosecution in the case in that in any event a client should be entitled to notice and a hearing before his lawsuit is dismissed because of something his lawyer has done. Plaintiff's action should not be dismissed if the defendant bears a large measure of responsibility for the delay", Foxboro Co. v. Fischer and Porter Co., D. C. Pa. 1961, 29 F.R. O. 522, although in Link case itself the defendant was at least as responsible as plaintiff for the delays prior to

counsel's failure to attend the pre-trial conference. The respondent in this case was like the same as in Link, but the dismissal in state court stated that the petitioner failed to prosecute not his attorneys, nor the attorney for the respondent who failed to answer his complaint, attend the pre-trial conference or attend the oral-argument. Petitioner filed a discrimination complaint in the U.S. District Court because his rights had been violated in state courts and by the respondent, 42 U.S.C. 1981 and 1983, the same as Thomas A. Rachel in Georgia v. Rachel, U. S. 365, they was denied and could not enforce their equal civil rights in Georgia State Court, 28 U.S.C. 1443 (1)(1964ed). Thedistrict court dismissed petitioner complaint the same as they dismissed Rachel et al., without giving them a chance to explain their

case to a jury. Petitioner dismissal was on a motion by the respondent that he failed to state a claim upon which relief can be granted. Petitioner appeal his case to the United States Court of Appeals of the Sixth Circuit Robinson v. Daugherty, et al., case no. 85-3569 and cited in Federal Question the Civil Rights Bill of 1964 which guaranteed every citizen of the U.S.A. equal civil rights as in Georgia v. Rachel, U. S. 365 where the court of appeals of Georgia remanded the case back to the district court and stated the defendants had a right to be heard. Petitioner had been discriminated against and his rights had been deprived, 42 U.S.C. 1981 and1983. In Flagg Brothers Inc. v. Brooks, 436 U. S. 149, 155 (1978) it is true that a private individual or entity who conspires with state officials to deprive a

citizen of his Constitutional rights maybe held accountable under 42 U.S.C. Section 1983, Martin Marietta Corp. v. Bendix Corp., 690 f.2d 558 (6th Cir. 1982). Pettitoner, not his attorney, were accused by the court of not prosecuting his case, also, the trial court judge stated the case had been dismissed in 1978 but it was not actually dismissed until 1983. In the federal questions petitioner cited the First Amendment in parts; the right of the people to petition the Government for a redress of grievances, the Seventh Amendment; trial by jury and the Fourteenth Amendment in parts; no state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the U.S.A. The Sixth Circuit Court of Appeals affirmed the District Court dismiss, that they dismissed plaintiff's action for lack of subject matter juris-

diction, however, on June 2, 1985, the district court dismissed the case on plaintiff's failure to state a claim upon which relief can be granted.

CONCLUSION

Wherefore, petitioner respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

Joe L. Robinson

Petitioner

Joseph P. Buchanan

2580 Kettering Tower

Dayton, Ohio 45423

Counsel for Respondent

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3569

JOE L. ROBINSON, Petitioner,

vs.

ROBERT C. DAUGHERTY,ET AL.,Respondent

(January 21, 1986)

BEFORE: Jones and Nelson, Circuit Judges; and Peck, Senior Circuit Judge.

Plaintiff is appealing from a judgment dismissing his civil rights action. The appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the briefs and record, this panel agrees unamiously that oral argument

is not necessary. Rule 34(a), Federal Rules of Appellate Procedure. The record shows that on 2-12-74, plaintiff sustained an injury while working for the defendant Delco Moraine Division, General Motors Corporation. He filed a claim with the Ohio Bureau of Workers Compensation which was denied. On 3-14,1978, he filed a complaint in the Common Pleas Court of Montgomery County, Ohio. The Common Pleas Court dismissed plaintiff's case for want of prosecution, and the Ohio Court of Appeals found that the trial court did not abuse its discretion in dismissing the action.

Whereupon, plaintiff filed the present case in federal court against his former employer and Robert C. Daugherty, the former Administrator of the Ohio Bureau of Worker's Compensation. Plaintiff alleged primarily that his former attorney (who was not named or made a party

to this action) had failed to prosecute his case in state court because he (plaintiff) was black and the attorney was white. In his "Second Motion to Amend Complaint" and "Motion to Amend for Jurisdiction", plaintiff also alleged that judges and other officials of the Ohio state courts had discriminated against him in handling his workers' compensation claim. In an order filed June 25, 1985, the district court dismissed plaintiff's action for lack of subject matter jurisdiction. This timely appeal followed. It is elementary that "state action" must exist to support a claim under 42 U.S.C. 1983. Flagg Brothers Inc. v. Brooks, 436 U.S. 149, 155 (1978). It is true that a private individual or entity who conspires with state officials to deprive a citizen of his constitutional rights may be held accountable under

Section 1983. Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir. 1982) However, plaintiff has not alleged conspiracy in the instant case, nor has he named as defendants any officials of the state court system who allegedly discriminated against him.

The district court properly concluded that plaintiff failed to state a federal cause of action. He has not presented a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. Plaintiff cannot establish jurisdiction under 28 U. S. C. 1357 ("Injuries under Federal Laws") because plaintiff was not enforcing any federal laws when he was injured. Finally, 28 U.S.C. 1445(c) provides that A civil action in any state court arising under the worker's compensation laws of said State may not be removed to any

district court of the United States."

Regardless of whether plaintiff may have a cause of action against his former attorney or officials of the state courts, the allegations made against the present defendants do not state a claim cognizable in federal court.

Therefore, it is ORDERED that the judgment of the district court be and it hereby is affirmed. Rule 9(d)(2), Rules of the Sixth Circuit. Entered By Order of the Court . John P. Hehman, Clerk.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-84-559

JOE L. ROBINSON, Petitioner,

vs.

ROBERT C. DAUGHERTY, et al., Respondent.

(June 2, 1985)

DECISION AND ENTRY SUSTAINING MOTION OF DEFENDANT DELCO-MORAINE TO DISMISS (DOC. $10); COMPLAINT DISMISSED AS TO DEFENDANT DELCO-MORAINE; COMPLAINT DISMISSED, SUA SPONTE AS TO DEFENDANT ROBERT C. DAUGHERTY; COMPLAINT DISMISSED WITH PREJUDICE; TERMINATION ENTRY.

The motion of the Defendant, Delco Moraine Division, General Motors Corporation, seeking an Order of the Court dismissing the Amended Complaint of the Plaintiff for the reason that same fails to state a claim upon which relief can be granted (Doc. #10), is deemed by this Court to be well taken and same is, therefore, sustained in its entirety.

Plaintiff's Second Motion to Amend Complaint (Doc. #8) and "Motion To Amend Motion For Jurisdiction" (Doc. #9), both of which were presumably filed in response to this Court's Decision and Entry of March 29, 1985 (Doc. #7) which conditionally sustained the Defendants' Motion to Dismiss the Plaintiff's original Complaint and directed him to file an Amended Complaint within 20 days, both fail to set forth a federal claim upon which relief can be granted. Plaintiff's conten-

tention appears to be that Delco should have paid him worker's compensation and that his attorney who handled the case (identity unknown) committed either an act of discrimination or an act of malpractice, or both, in failing to prosecute said claim. Additionally, in his most recent pleading (Doc. #9), the Plaintiff appears to ask this Court to intervene in a pending collection suit against him in the Dayton Municipal Court. Of course, the abstention principles of Younger v. Harris, 401 U.S. 37 (1971), prevent such intervention by this court. It is clear to this Court that the Plaintiff has failed, in spite of having been given several opportunities to do so, to set forth an actionable federal claim of discrimination.

Dismissal against the Defendant Delco Moraine Division, General Motors Corporation, is with prejudice. This

Court feels that the plaintiff, having been given several opportunities to file Complaints in which sufficient facts are alleged to support a claim of race discrimination, ought not to be free to harrass the Defendants any further. In this Court's opinion, it has complied with the Sixth Circuit in Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983).

The defendant, Roberty C. Daugherty, has failed to enter an appearance in this case. However, Robert C. Daugherty, as the former Administrator of the Bureau of Workers' Compensation for the state of Ohio, is, nonetheless, entitled to a sua sponte ruling by this court that he should be dismissed as a party defendant to this litigation. There is nothing in any of the pleadings filed by the plaintiff which would lead to an inference that said defendant (or anybody working under him)

committed any acts which fall within the prohibition of the federal laws against racial discrimination. In this Court's opinion, the Tingler decision, supra, ought not to require the Plaintiff to perform the vain act of amending a complaint wihch cannot set forth any federal claim for relief. The dismissal against the defendant Daugherty is, therefore, with prejudice.

The captioned cause having been dismissed, with prejudice, is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Walter H. Rice
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

No. 8516

JOE L. ROBINSON, Petitioner,

vs.

ROBERTY C. DAUGHERTY, et al.

(June 1, 1984)

PER CURIAM:

On October 14, 1977 appellant, pro se, filed a notice of appeal in the Common Pleas Court of Montgomery County appealing from the November 6, 1975 order of the Dayton Board of Review of the Ohio Industrial Commission. On March 7, 1978, the trial court ordered appellant to comply with the Civil Rules and the rules of the court within ten days or risk dismissal with prejudice in accordance with Civ.

R. 41 (B) (1) and (3). On March 14, 1978 appellant filed his complaint. Appellee Delco Moraine filed its answer April 3, 1978. The Bureau of Worker's Compensation filed its answer on August 4, 1978. Procedural delays ensued, including appearances and subsequent withdrawals by various attorneys on appellant's behalf. The trial court set this matter for trial for January 15, 1979. On February 14, 1979, the trial court ordered appellant to comply with the Civil Rules and thr rules of court within ten days or risk dismissal with prejudice in accordance with Civ. R. 41 (B) (1) and (3). A separate entry of notice to appellant was also filed. On March 14, 1979, the trial court dismissed the action for appellant's failure to prosecute. On November 2, 1979, appellant (represented by counsel) filed a petition to bacate the order of dismissal.

On November 9, 1979, the trial court set the matter for a hearing the following week.

The next entry of record is appellant's pro se "appeal," filed in the Common Pleas Court, mentioning "new" evidence concerning neck surgery. The present appeal, filed with this court September 2, 1983, is on in which appellant assigns as error the trial court's failure to award him a default judgment. On September 6, 1983, the trial court entered an order of dismissal nunc pro tunc, relative to March 21, 1978 and pursuant to Civ. R. 41 (B) (1). Appellant filed a motion to amend or supplement his pleadings, which we overruled on November 7, 1983. This court also overruled appellant's "motion for default" on December 28, 1983, and ordered appellant fo file a brief within twenty days. Appellant filed an appellate

brief on January 3, 1984. Essentially, appellant asserts the trial court erred in failing to award default judgment in his favor and in dismissing his cause of action. Appellant alleged that on March 14, 1978, he filed a pleading for default judgment which the trial court refused to sign. The only entry appearing on that date, however, is the complaint (in appeal) which appellant filed in Common Pleas Court appealing the decision of the Board of Review. Appellant further alleges that on August 30, 1983, he filed a pleading for default which was not signed by the trial court. Such a refused pleading similarly does not appear in the docket entries. Appellant also asserts that at the time the trial court refused to grant default judgment, it dismissed his cause of action for failure to prosecute. No dismissal, however, appears

of record on that date. R.C. 4123.519, which provides for appeals to the Court of Common Pleas from decisions of the Board of Review, requires a claimant, within 30 days after filing his notice of appeal, to "file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basic for the jurisdiction of the court over the action." Appellant did not comply with this requirement until March 14, 1978, when he filed his complaint. Accordingly, appellees could not have been in default pursuant to the Civil Rules until after the filing ot this complaint. Any refusal to award a default on March 14, 1978, was therefore proper. The trial court's alleged refusal August 30, 1978, to award default judgment similarly did not constitute error. By that date, both

Delco Moraine and the Bureau of Workers' Compensation had filed answers. The third appellee, the Industrial Commission, only becomes a party to such suits upon its own motion, according to R. C. 4123.519. Thus, the trial court properly refused appellant's request. The trial court dismissed appellant's cause of action on March 14, 1979, for failure to prosecute, pursuant to Civ. R. 41 (B) (1). The trial court imposed this sanction following months of enexplained procedural delays, appearances and withdrawals by numerous attroneys on appellant's behalf, two show cause orders, written notice to appellant, and a twenty day grace period. Civ. R. 41 (B) (1) provides: Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

A trial court's dismissal of a case for want of prosecution, pursuant to Civ. R. 41 (B) (1), will not be reversed unless it constitutes an abuse of discretion. Schreiner v. Karson (1977), 52 Ohio App. 2d 219.

Upon review, we find no such abuse. Accordingly, appellant's appeal is denied and the judgment of the trial court is hereby affirmed.

.....

BROGAN, P.J., WILSON, J., and WEBER, J., concur.

APPENDIX "D"

COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

No. 77-2348
No. CA-8387

JOE L. ROBINSON, Petitioner,

vs.

ROBERT DAUGHERTY, Adm., et al, Respondent

(September 6, 1983)

ORDER OF DISMISSAL NUNC PRO TUNC
MARCH 21, 1978.

The court having served upon plaintiff-appellant a notice to show cause why this case should not be dismissed for want of prosecution in accordance with Civil Rule 41 (B) (1), and there having been a failure to show cause within the time as prescribed, the

Court hereby dismisses this act ion for failure of the plaintiff-appellant to prosecute this action.

Costs assessed against the plaintiff-appellant.

SO ORDERED:

John M. Maegher, Judge

Application for Review of the Decision of the Sixth Circuit Court of Appeals-Lack of Subject Matter Jurisdiction.

Sixth Circuit - Case no. 85-3569

Joe L. Robinson, Dayton, Ohio,

Petitioner

Joseph P. Buchanan, Attorney
2580 Kettering Tower
Dayton, Ohio 45423

for Respondent